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H.R. Rep. No. 94-1609 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162 . . . . . 14-15, 17

H.R. Rep. No. 90-1629 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252 14

Judicial Conference of the United States, *Long Range Plan for the Federal Courts* (Dec. 1995) 14

L. Ralph Mecham, *1987 Annual Report of the Director of the Administrative Office of the United States Courts* (1987) 13

L. Ralph Mecham, *2004 Judicial Business of the United States Courts* (2005) 13

Report of the Federal Courts Study Committee (1990) 14, 15

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Beazer East, Inc. ("Beazer") respectfully petitions for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on June 23, 2005.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit ("Third Circuit") is reported at 412 F.3d 429 (3d Cir. 2005). App. 5a–42a. Beazer's Petition for Rehearing En Banc was denied without opinion, in an unpublished order issued on July 21, 2005. App. 1a–2a. The various decisions of the United States District Court for the Western District of Pennsylvania that are included in the appendix were not reported. App. 43a–247a. An earlier decision of the Court of Appeals for the Third Circuit regarding this case is reported at 34 F.3d 206 (3d Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995).

JURISDICTION

The Third Circuit issued its order denying Beazer's Petition for Rehearing En Banc on July 21, 2005 (App. 1a–2a), and this Petition for a Writ of Certiorari is being timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 636(b)(3) of the Federal Magistrates Act ("Magistrates Act") provides: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3) (2005). Section 636 of the Magistrates Act, is reproduced in the appendix to this petition. App. 248a–257a.

Section 113 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613, is reproduced in the appendix. App. 258a–269a.

STATEMENT OF THE CASE

This petition seeks review of a decision of the Third Circuit overturning and remanding a judgment of the United States District Court for the Western District of Pennsylvania (the "District Court"). The central issue in this petition involves the District Court's referral of certain "additional duties" to a magistrate judge pursuant to § 636(b)(3) of the Magistrates Act for a report and recommendation on appropriate equitable allocation factors in a CERCLA cost-recovery case. Beazer requests that this Court ultimately hold that there is no constitutional provision or federal law prohibiting a magistrate judge from conducting a civil nonjury hearing, even if a party objects, provided that the district court makes a *de novo* determination of the magistrate's proposed findings.

The District Court had federal question jurisdiction over this case under 42 U.S.C. § 9613(b), which vests exclusive original jurisdiction over all controversies arising under CERCLA with the United States District Courts. The Court of Appeals had jurisdiction over the appeal from the District Court's final orders pursuant to 28 U.S.C. § 1291.

The underlying case involves responsibility for cleaning up a coke plant that was operated by each of the parties in Woodward, Alabama (the "Coke Plant"). The Mead Corporation ("Mead") was responsible for the operation of the Coke Plant from 1910 until 1974, during which period the District Court found that ninety percent of the wastes at issue had been disposed of on the Coke Plant. App. 55a. In 1974,

Beazer acquired the Coke Plant from Mead pursuant to an Asset Purchase Agreement and continued operations there until December 29, 1988. Thereafter, Koppers Industries, Inc. ("KII") acquired the operations portion of the facility from Beazer, and operated the Coke Plant until it was deactivated in 1998 and ultimately demolished in 1999.

Since 1981 and without any contribution from Mead, Beazer has incurred substantial environmental investigation and remediation costs, now totaling more than $10 million, to address the release and/or threat of release of hazardous substances at the Coke Plant. Beazer filed this case with the District Court in 1991, alleging causes of action under CERCLA, the 1974 Asset Purchase Agreement and several common law theories seeking contribution from Mead for its fair share of the costs to investigate and remediate the environmental conditions at the Coke Plant. The procedural history of this case between the filing of the complaint and the first time this case was addressed by the Third Circuit is set forth at *Beazer East, Inc. v. Mead*, 34 F.3d at 209-10.

On July 8, 1996, after remand from the Third Circuit, District Court Judge Gustave Diamond, in an effort to preserve judicial economy, referred the matter to Magistrate Judge Kenneth Benson (the "Magistrate") for: "(1) proposing the equitable factors to be considered under § 9613(f) [of CERCLA], (2) submitting briefs in support of an allocation of Beazer's clean-up costs among the parties and, after a hearing if necessary, (3) a submission of report [to the District Court] addressing the same." App. 246a. Following a scheduling conference, the Magistrate directed the parties to file briefs and proposed findings of fact and conclusions of law on allocation issues, at which time, if necessary, he would hold a hearing on the matter. App. 240a–243a. Shortly after the issuance of the Magistrate's Order, Mead filed objections,

asserting that the Magistrate was without authority to either conduct a hearing or issue a report and recommendation on the subject of allocation factors. On April 30, 1997, the District Court denied Mead's Objections. App. 233a–239a.

Thereafter, the Magistrate undertook several tasks designed to simplify the issues that would need to be addressed by the District Court in this complex case, which has generated over 360 separate District Court docket entries in its fourteen-year history. Many of these entries highlight the considerable effort spent by the Magistrate in narrowing the issues that would be presented to the District Court. For example, the Magistrate ruled on five separate motions in limine (see Docket Nos. 269, 271) as well as thousands of objections to both deposition designations (see Docket No. 302) and various exhibits (see Docket No. 302). After conducting a hearing consistent with the District Court's reference, the Magistrate issued a report recommending proposed findings of fact and conclusions of law. Specifically, the Magistrate identified and proposed various equitable allocation factors, and based on those factors recommended the following allocation of liability: KII 2.5%; Mead 73.75%; and Beazer the remaining 23.75%. App. 231a. Mead filed extensive objections to the report and recommendation, which were considered by the District Court. On March 7, 2000, the District Court issued an opinion and order wherein he made a *de novo* determination of the Magistrate's findings by reviewing all of the evidence presented before the Magistrate. The District Court revised the Magistrate's Proposed Findings of Fact and Conclusions of Law by ruling that Mead's fair share of response costs was 67.5%, with the remaining 32.5% being allocated to the post-1974 Owners of the Coke Plant, Beazer and KII. App. 122a, 128a. In so doing, the District Court increased Beazer's

share and gave greater weight to certain equitable allocation factors proposed by the Magistrate.

Thereafter, the District Court held a trial on the damages phase of this litigation in February 2002, at which time the District Court determined which of Beazer's claimed response costs were necessary and consistent with the National Contingency Plan, 40 C.F.R. § 300 (1990), and, therefore, recoverable from Mead (less Beazer's allocated share). In its August 29, 2002 Order, the District Court entered judgment in Beazer's favor and against Mead in the amount of $3,243,467.80. App. 50a–51a. In addition, on September 17, 2002, the District Court entered an order awarding Beazer $1,538,164.03 in prejudgment interest. App. 48a–49a. Finally, on October 8, 2002, the District Court issued a declaratory judgment that Mead is liable for 67.5% of all future response costs incurred by Beazer regarding the Coke Plant. App. 43a–45a.

On September 27, 2002, Mead appealed to the Third Circuit many of the rulings described above, but principally challenged the District Court's July 8, 1996 referral to the Magistrate for a report and recommendation on the allocation factors to be considered. After briefing, oral argument was held before the Third Circuit on December 16, 2004. The Third Circuit issued its Opinion on June 23, 2005 (App. 5a–42a) and denied Beazer's Petition for Rehearing En Banc on July 21, 2005. App. 1a–2a. As will be discussed below, the Third Circuit's Opinion represents a radically-restrictive, fringe view of subsection (b)(3) of the Magistrates Act. In its opinion, the Third Circuit: failed to identify any constitutional or statutory prohibition against the District Court's referral to the Magistrate; incorrectly ruled that the Magistrate "resolved factual issues going to one of the ultimate issues in the case"; completely ignored the District Court's *de novo* determination

of the Magistrate's findings; and misapplied this Court's holdings in *Peretz v. United States*, 501 U.S. 923 (1991) and *Gomez v. United States*, 490 U.S. 858 (1989), criminal cases with constitutional implications not present in this case. App. 16a–34a.

For the reasons set forth more fully below, the reasoning, analysis and ruling of the Third Circuit with respect to the "additional duties" clause of the Magistrates Act is flawed and adds to the widespread conflict and uncertainty between the Circuit Courts of Appeal regarding the use of magistrates in civil cases.

REASONS FOR GRANTING THE PETITION

Summary of Argument

In 28 U.S.C. § 636(b)(3), Congress authorized district courts to utilize magistrates to the full extent "not inconsistent with the Constitution or laws of the United States." In this case, the Third Circuit has taken an extremely restrictive view of this language that would dramatically limit district courts' use of magistrates in civil cases. This Court should grant certiorari to review this decision for three reasons. First, this decision is in direct conflict with a case decided by the Tenth Circuit, and also conflicts with the rationale articulated by several other circuits. Second, the scope of the magistrate's authority pursuant to subsection (b)(3) in civil cases represents an important question of federal law that has not been, but should be, settled by this Court. Third, the Third Circuit's decision conflicts with the reasoning articulated by this Court in its one decision addressing the scope of the "additional duties" clause in the civil context, *Mathews v. Weber*, 423 U.S. 261 (1976), and with the decisions of this Court that have discussed the scope of subsection (b)(3) in the criminal

context, particularly *Peretz* and *Raddatz v. United States*, 447 U.S. 667 (1980).

I. The Decision of the Third Circuit Directly Conflicts with the Tenth Circuit and Generally Conflicts with Decisions of Other Circuits.

Pursuant to Supreme Court Rule 10(a), there is a compelling reason for this Court to grant this Petition for Certiorari. As will be discussed below, the Third Circuit's decision in this case is in direct conflict with a case from the Tenth Circuit, and generally conflicts with the reasoning and rationale articulated by several courts of appeals that have interpreted the scope of a magistrate's authority when given an assignment pursuant to § 636(b)(3) of the Magistrates Act.

A. The Third and Tenth Circuits are in Direct Conflict.

In *Clark v. Poulton*, 963 F.2d 1361 (10th Cir.), *cert. denied*, 506 U.S. 1014 (1992), the Tenth Circuit upheld the nonconsensual referral to a magistrate for the complete hearing of an entire civil case, followed by a report and recommendation. The district court then made a *de novo* determination of the magistrate's proposed findings. The *Clark* Court reasoned that the 42 U.S.C. § 1983 claim at issue in that case was comparable in importance to a nonconsensual referral of a prisoner's challenge to the conditions of his confinement, which this Court upheld in *McCarthy v. Bronson*, 500 U.S. 136 (1991). The Tenth Circuit emphasized the practical need for district courts to have maximum flexibility in referring matters to magistrates. Significantly, the Tenth Circuit was clear that its decision in *Clark* was based entirely on subsection (b)(3), and not on subsection (b)(1)(B), upon which the *Clark* Court specifically declined to rely.

According to Judge Seymour's Dissent in *Clark*, the majority's interpretation of subsection (b)(3) "would permit a district court to refer to a magistrate the entire civil trial of any plaintiff, without consent, so long as the district court retained *de novo* review." *Id.* at 1369 (Seymour, J., dissenting). Based largely on the rationale contained in Judge Seymour's Dissent, Clark petitioned this Court for certiorari, raising the question: "Does section 636(b)(3) authorize a district court to refer a civil rights action to a Federal Magistrate for trial without the plaintiff's consent?" No. 92-557, 1992 WL 12073986, at i (1992). While this Court declined to answer this question in *Clark*, there is now a clear split between the Tenth and Third Circuits. In *Clark*, the Tenth Circuit answered this question in the affirmative and authorized the expanded use of magistrates in civil cases so long as the district court makes a *de novo* determination of the magistrate's findings. In contrast, the Third Circuit would answer this question in the negative since it has now taken an extremely narrow view of a magistrate's authority to conduct evidentiary hearings in civil cases, regardless of whether the district court makes a *de novo* determination of the magistrate's findings.[1] Given the widespread use of magistrates throughout the country (discussed in greater detail below), this important conflict between the Third and Tenth Circuits demands this Court's attention.

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[1] The reference at issue here was for the Magistrate to issue a report and recommendation on CERCLA allocation factors. In *In re Armco*, 770 F.2d 103 (8th Cir. 1985), the Eighth Circuit approved use of a magistrate to handle all aspects of a CERCLA case except liability. While other circuits have criticized this approach, *see Stauble v. Warrob, Inc.*, 977 F.2d 690, 696 (1st Cir. 1992) and *In re United States*, 816 F.2d 1083, 1091 (6th Cir. 1987), the circuit split on this narrow CERCLA referral issue is indicative of broader uncertainty about magistrates' civil authority.

B. The Third Circuit's Opinion Generally Conflicts with the Manner in Which Other Circuits Have Analyzed the Magistrates Act.

The Seventh and Second Circuit courts have agreed with the Tenth Circuit's approach and applied the plain language of § 636(b)(3) to approve an expansive view of district courts' use of magistrates. *See In Matter of Establishment Inspection of Gilbert & Bennett Mfg.*, 589 F.2d 1335, 1340–41 (7th Cir. 1979) (involving an OSHA search warrant and holding that magistrates could perform any duties that were not explicitly excluded); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1133 (2d Cir. 1977) (upholding nonconsensual referral for an entire bench trial with only "clearly erroneous" review due to length, complexity and classified information involved).

The Third Circuit's discomfort with a magistrate making a report and recommendation on "factual disputes going to one of the ultimate issues in the case" (App. 6a) is also out of step with the approach taken by the Fifth Circuit. *See Feist v. Jefferson County Comm'rs Court*, 778 F.2d 250, 251 (5th Cir. 1985) (even if it would be improper to refer for a "jury trial" without consent, referral was proper for an "evidentiary hearing" to "dig beneath conclusional allegations" (quoting *Spears v. McCotter*, 766 F.2d 179, 180 (5th Cir. 1985)).[2]

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[2] The Fifth Circuit's approach has been endorsed by respected legal commentators. For example, in Kent Sinclair, *Practice Before Federal Magistrates* § 18.01(a) (2004), the author explains that the exceedingly broad range of issues that may be referred for a report and recommendation include "all aspects of a proceeding, entire phases of a case (liability, damages), or more specific issues on which evidence is required (amount of damages)." Professor Sinclair also wrote that there is authority to refer "virtually any form of evidentiary hearing that would be of assistance in an action pending in federal court." *Id.*

The Third Circuit also fundamentally disagrees with the Sixth and Fifth Circuits concerning the significance of the district court's *de novo* review. *See Ford v. Estelle*, 740 F.2d 374, 380 (5th Cir. 1984) (the safeguarding role of the district court remains in place even when an evidentiary hearing expands into a full jury trial covering all issues presented); *Hill v. Duriron Co.*, 656 F.2d 1208, 1214 (6th Cir. 1981) (referral of employment discrimination case for hearing and recommended disposition would be proper if district court conducted *de novo* review); *see also Practice Before Federal Magistrates* § 18.01a, 18-3 ("So long as the result of the evidentiary hearing before the magistrate will be treated as proposed findings and a recommended disposition, all subject to review by a district judge, the referral will be considered proper.").

The Third Circuit's conclusion that the Magistrate "resolved" critical factual disputes (App. 6a, 20a-22a) also creates a circuit split because several other circuits have ruled that an assignment under subsection (b)(3) does not "resolve" anything provided that the magistrate's proposed findings are subject to *de novo* determination by the district court. *See Rajaratnam v. Moyer*, 47 F.3d 922, 924-25 (7th Cir. 1995); *Massey v. City of Ferndale*, 7 F.3d 506, 509 (6th Cir. 1993) (matters assigned to a magistrate under § 636(b)(3) are not subject to final determination by the magistrate); *Estate of Conners v. O'Connor*, 6 F.3d 656, 659n.2 (9th Cir. 1993) (magistrate did not have authority to enter final order under § 636(b)); *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 925 F.2d 853, 856 n.5 (5th Cir. 1991) (when a case is referred to the magistrate under § 636(b)(3), "the magistrate is not authorized to enter judgment for the court; she makes only proposed findings of fact and recommends a ruling on the motion"); *Colo. Bldg. & Constr. Trades Council v. B.B. Andersen Constr. Co.*, 879 F.2d 809, 811 (10th Cir.

1989) (stating that a magistrate assigned additional duties under § 636(b)(3) "remains constantly subject to the inherent supervisory power of the district judge") (quoting *Harding v. Kurco, Inc.*, 603 F.2d 813, 814 (10th Cir. 1979) (quoting *Mathews v. Weber*, 423 U.S. at 270)).

In summary, the above cases represent a variety of approaches to the interpretation of subsection (b)(3) taken in the courts of appeals. The approach taken by the Third Circuit, however, represents an extreme departure that should be overturned by this Court.

II. This Court Has Not Ruled on the Application of § 636(b)(3) in Civil Cases, but This Is an Important Question of Federal Law That Should Be Settled by This Court.

Pursuant to Supreme Court Rule 10(c), one of the compelling reasons for this Court to grant a Writ of Certiorari is that the opinion being appealed from decides "an important question of federal law that has not been, but should be, settled by this Court." The following section of this Petition will address two points: (1) the application of § 636(b)(3) of the Magistrates Act in civil cases has not yet been resolved by this Court; and (2) this is an important question of federal law that should be settled by this Court.

A. This Court Has Not Ruled on the Scope of the Authority Created by Congress in § 636(b)(3) for District Courts to Refer Non-Jury Civil Matters to Magistrates Without the Consent of the Parties.

This case is a perfect opportunity for this Court to rule on the constitutional and statutory limits of nonconsensual referrals to magistrates in civil cases under § 636(b)(3). While this Court's decision in *Mathews v. Weber*, 423 U.S. at 270 (permitting the use of magistrates to handle all aspects

of Social Security cases), provides guidance on this issue, this Court has not ruled since the 1976 amendments to the Magistrates Act upon the scope of district courts' authority to assign magistrates significant portions of civil cases over the objections of a party where the district court retains the ability to make a *de novo* determination of the magistrate's proposed findings. *See A Constitutional Analysis of Magistrate Judge Authority,* Magistrate Judges Division of the Administrative Office of the United States Courts, 150 F.R.D. 247, 251 (June 1993).

As discussed in greater detail below, while this Court's opinions regarding the Magistrates Act suggest that the referral in this case was proper, this Court has only addressed the scope of subsection (b)(3) in referrals to magistrates in criminal cases, where fundamental constitutional concerns are prevalent. *See Peretz*, 501 U.S. at 932–33 (magistrates may conduct jury selection in a felony case only upon the parties' consent); *Gomez*, 490 U.S. at 868–69 & n.15; and *Raddatz*, 447 U.S. at 673 (district court could refer suppression hearing to magistrate without parties' consent).

B. This Is an Important Issue That Should Be Settled by This Court.

There are three distinct reasons why the application of § 636(b)(3) of the Magistrates Act is an important issue that should be settled by this Court: (1) providing guidance on this issue is essential to judicial economy; (2) if this case is not heard, the Third Circuit's decision will have a significant chilling effect on the Congressional intent to permit district courts to experiment with the use of magistrates, an intent that has been recognized and endorsed by this Court; and (3) the express language of the statute requires that this Court articulate any constitutional limitations regarding the additional duties of magistrates.

1. Providing Guidance on the Scope of "Additional Duties" That Can Be Assigned to Magistrates Pursuant to § 636(b)(3) Is Essential to Judicial Economy.

Resolution of this issue will have wide-ranging benefits. Magistrates perform a "staggering volume of judicial work." *Peretz*, 501 U.S. at 928 n.5 (citing supporting statistics). This Court has recognized that Congress intended magistrates to play an "integral and important role in the federal judicial system." *Gomez*, 490 U.S. at 869 (quoting H.R. Rep. No. 96-287, at 5 (1979)); *McCarthy*, 500 U.S. at 142; *Peretz*, 501 U.S. at 928 (magistrate's role is "nothing less than indispensable") (quoting *Government of Virgin Islands Williams*, 892 F.2d 305, 308 (3d Cir. 1989)).

In the fourteen years since *Peretz*, the use of magistrates has dramatically increased. Some illustrative statistics demonstrate the vital role magistrates continue to play in the federal court system. When *Peretz* was decided, magistrates performed 162,512 civil case duties. L. Ralph Mecham, *1987 Annual Report of the Director of the Administrative Office of the United States Courts* 129 (Table S-28) (1987). During the fiscal year ending September 20, 2004, magistrates performed 303,895 civil case duties, an 87% increase. *See* L. Ralph Mecham, *2004 Judicial Business of the United States Courts* 24-25, 61 (Table S-17) (2005). Magistrates submitted significantly more reports and recommendations in prisoner petitions and other civil matters in 2004 than in 1987. *Id.* at 366 (Table M-4B); *1987 Annual Report* at 409 (Table M4-A). District court case loads continue to increase. *2004 Judicial Business* at 16 (Table 3), 20 (Table 5). Thus, the need to fully utilize magistrates continues to become even more pressing than when *Peretz* was decided.

The judiciary itself has recognized the importance of clearly defining the scope of a magistrate's authority. The *Report of the Federal Courts Study Committee* 80 (1990) stated: "Some district courts have been reluctant to expand the role of magistrates because of confusion over magistrates' constitutional and statutory authority." *See also Report to the Subcommittee on the Structure of the Federal Courts of the Federal Courts Study Committee* (May 1, 1989) *in II Federal Courts Study Committee, Working Papers and Subcommittee Reports* 79-156 (June 1, 1990) ("The challenge is to persuade judges to use magistrates fully."). The Federal Courts Study Committee recommended that district court judges be provided with a specific list of tasks that fall within the "additional duties" authorized in § 636(b)(3). *Report of the Federal Courts Study Committee* 80 (1990). The Judicial Conference has also called for a "national approach," Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 102 (Dec. 1995), which obviously must come from this Court. Thus, Congress, the judiciary, and commentators have all recognized the benefits to judicial economy that will result from this Court defining the scope of "additional duties" available to be delegated in civil cases pursuant to subsection (b)(3).

2. The Third Circuit's Decision Will Have a Significant Chilling Effect on the Congressional Intent to Permit District Courts to Experiment with the Use of Magistrates.

The Magistrates Act was first enacted in 1968, to address deficiencies in the former U.S. Commissioner system. H.R. Rep. No. 90-1629 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4255–57. Congress intended, from the beginning, for district courts to use magistrates extensively. H.R. Rep. No. 94-1609 at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162,

6166. The language giving magistrates authority to act in any way "not inconsistent with the constitution and laws of the United States" has been present since the initial act. Originally, however, the "additional duties" clause was simply included in the middle of § 636(b). 28 U.S.C. § 636(b) (1968).

Congress has amended the Magistrates Act on several occasions, each time to expand magistrates' duties and authority. For example, in 1976, in response to this Court's narrow interpretation in *Wingo v. Wedding*, 418 U.S. 461 (1974), Congress amended the statute to indicate that magistrates could hold evidentiary hearings in habeas corpus cases. In these amendments, Congress also moved the "additional duties" clause to a new, stand-alone subsection in order to encourage experimentation with other uses of magistrates and to emphasize that subsection (b)(3) was not limited by other sections of the Act. H.R. Rep. No. 94-1609 at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6172. District courts, however, have still not been as innovative as Congress had hoped and have continued to be "reluctant to expand the role of magistrates because of confusion over magistrates' constitutional and statutory authority." *Report of the Federal Courts Study Committee* 80 (1990).

This Court has recognized Congress' intent several times. In *McCarthy*, this Court, in interpreting § 636(b)(1)(B), took guidance from the policy behind the Magistrates Act, the goal of which the Court observed was to "authorize greater use of magistrates to assist in handling an ever-increasing caseload." 500 U.S. at 142–43 (quoting S. Rep. No. 94-625, at 2 (1976)) (holding that its permissive interpretation of the proscribed duties of the magistrate is "consistent with this purpose because it will allow referral of a broader category of

cases").[3] In *Raddatz*, this Court noted legislative history showing Congress' belief that constitutional concerns were satisfied so long as the ultimate determination was made by the district court. 447 U.S. at 681 n.8 ("Congress reasoned that permitting the exercise of an adjudicatory function by a magistrate, subject to ultimate review by the district court, would also pass constitutional muster."). In *Raddatz*, this Court recognized that suppression hearings often determine the outcome of a case, but concluded that a *de novo* review was sufficient to protect the constitutional interests involved. *Id.* In a unanimous decision, this Court recently observed that "Congress intended to authorize the nonconsensual reference of *all* prisoner petitions to a magistrate," including suits alleging isolated episodes of unconstitutional conduct. *Porter v. Nussle*, 534 U.S. 516, 526–27 (2002) (emphasis in original) (quoting *McCarthy*, 500 U.S. at 140).

In *Peretz*, this Court concluded that Congress intended "to give federal judges significant leeway to experiment" with other uses of magistrates. 501 U.S. at 932. This Court encouraged district judges to explore possible ways to

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[3] Interestingly, in *McCarthy*, this Court expressed concern with generating additional work for district courts resulting from potential disputes regarding whether the case at issue was challenging ongoing conditions of confinement or whether the case was challenging specific acts of alleged misconduct. 500 U.S. at 143. In other words, this Court was concerned with getting districts courts bogged down in disputes over how to label a particular case. Similarly, the Third Circuit's ruling in this case will lead to ongoing disputes in district courts over whether the matters assigned to a magistrate are "subsidiary" or "central" to the issue in the case. Clearly, the authority of a magistrate to hear a particular phase of the case should not hinge on the label applied to that phase. So long as the district court retains the ability to make a *de novo* determination of the magistrate's proposed findings, the label of "subsidiary" or "central" is irrelevant.

improve the efficiency of the judiciary "that had not already been tried or even foreseen." *Id.* Congress has also clearly invited creative use of magistrates. *See, e.g.*, H.R. Rep. No. 94-1609, at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6172 (under subsection (b)(3) "district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters'").

The District Court accepted the invitation to experiment in a complex CERCLA case. The referral was limited to the submission of a report and recommendation regarding the equitable factors to be considered in resolving the allocation inquiry. This innovative assignment to the Magistrate was carefully controlled by the District Court, which retained full authority to make a *de novo* determination regarding the report and to make the final decision. The Magistrate conducted a hearing that is analogous to lengthy, multiple-expert *Daubert* hearing.[4] In addition to being innovative way to exercise the equitable allocation discretion afforded the District Court and reduce its workload in this complicated CERCLA case, as discussed in greater detail below, the referral at issue falls well within the boundaries established by the statutory language and the opinions of this Court. Nevertheless, the Third Circuit was scathing in its criticism, both as to the scope of the referral and as to the veracity of the District Court's *de novo* review. App. 16a–34a. If allowed to stand, the Third Circuit's decision will result in the District Court now having to re-hear the equitable allocation phase of this case, which is now in its fourteenth year, despite the fact that it has already considered this evidence. Is this

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[4] For example, in *Barnes v. Kerr Corp.*, 418 F.3d 583 (6th Cir. 2005), the Sixth Circuit acknowledged, and took no issue with the magistrate's conducting of a *Daubert* hearing.

the "reward" district courts should expect for accepting this Court's invitation to experiment?

The unique equitable powers vested in district courts pursuant to § 113(f) of CERCLA present the exact type of case that this Court has indicated would be appropriate to use a magistrate. In light of the Congressional mandate to permit district courts to experiment with the use of magistrates, the Third Circuit's view of § 636(b)(3) is overly narrow and operates to prevent district courts from promoting judicial economy, especially in CERCLA cases, which are notoriously complex and prone to taxing the judicial system.[5] At an absolute minimum, the unique intersection of a district court's expansive discretion to (1) innovatively utilize magistrates, and (2) determine the appropriate equitable factors for allocation proceedings under § 113(f) of CERCLA, justified the District Court's referral in the instant case.

If allowed to stand, the Third Circuit's Opinion will serve as a stark warning to other courts inclined to experiment with the use of magistrates. This Court and Congress have both encouraged district courts to experiment with novel and innovative uses of magistrates. The inflexible, formalistic approach taken below will prevent precisely those uses of magistrates aimed at improving judicial efficiency and will bring the desired experimentation to a screeching halt.

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[5] As noted earlier, contrary to the Third Circuit's assertion that this case does not present any "administrative challenges," this case involved a plant that operated for nearly 100 years, and the record that was reviewed *de novo* by the District Court included nearly 1,200 exhibits and volumes of deposition designations.

3. The Express Language of the Statute Requires That This Court Articulate Any Constitutional Limitations Regarding the Additional Duties of Magistrates.

The text of subsection (b)(3) cries out for a constitutional interpretation by permitting the assignment of any "additional duty" that is "not inconsistent with the Constitution and laws of the United States." Because there is no federal law that limits a district court's ability to refer a civil nonjury hearing to a magistrate judge, any such limitation must emanate from the Constitution. Accordingly, it is incumbent upon this Court to articulate those limits. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 378–79 (2000); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The structure of § 636 of the Magistrates Act places decision-making authority with this Court. Subsection (b)(1)(A) gives authority to refer "any" pretrial matters, with certain enumerated exceptions, and requires only "clearly erroneous" review by the district court. Subsection (b)(1)(B) gives magistrates express authority to conduct "hearings, including evidentiary hearings" and to submit proposed findings and recommendations on the matters excepted in subsection (b)(1)(A) and other matters, subject to a *de novo* determination by the district court. Subsection (b)(2) covers magistrates' role as special masters. Subsection (c) provides that, upon consent of the parties, magistrates may preside over *entire* jury or non-jury civil trials *and enter judgment*, with ***no*** review by the district court. In referrals under § 636(c), the Article III judge's involvement effectively ends. *See Roell v. Withrow*, 538 U.S. 580, 585 (2003) ("Unlike nonconsensual referrals of pretrial but case-dispositive matters under section 636(b)(1), which leave the district court free to do as it sees fit with the magistrate judge's recommendations,

a section 636(c)(1) referral gives the magistrate judge full authority over dispositive motions."); *accord Ford*, 740 F.2d at 379 (subsection (b) nonconsensual referrals are constitutional based on the district court's control over the ultimate disposition while subsection (c) referrals are premised on the "entirely different notion" of the parties' consent). Congress intended subsection (b)(3) to fill the gaps left in these provisions. *See Peretz*, 501 U.S. at 932 (recognizing Congress' intent for full use of magistrates to the limits established by the Constitution or other law by including a "broad residuary clause").

In *Peretz*, this Court relied upon the fact that the defendant consented to the assignment of jury selection to the magistrate, of a duty that is not readily susceptible to *de novo* review. *Id.* The text of subsection (b)(3), however, in no way conditions a magistrate's authority upon a party's consent. Moreover, *Peretz* itself acknowledges, "If Congress had intended to strictly limit these additional duties to functions considered in the committee hearings or debates, presumably it would have included in the same statute a bill of particulars rather than a broad residuary clause." *Id.* at 932-33. Further, because subsection (c) explicitly deals with situations in which a party has consented, the lack of a consent requirement in subsection (b)(3) must be regarded as intentional. This is the logical reading of § 636—subsection (b) deals with nonconsensual designations, and subsection (c) deals with consensual designations.

The natural question then becomes, why did Congress provide for consensual designations of nonjury civil matters in § 636(c) if such matters can be designated without consent pursuant to § 636 (b)(3)? The answer to this question lies in the review of the magistrate's findings, which is fundamentally different—under subsection (b)(3) such a

decision is subject to the district court's *de novo* determination, while under subsection (c)(1) such a decision is not reviewed at all by the district court. This distinction is extremely important. However, because the lower courts are clearly in conflict on this issue, this Court should clarify this issue by holding (as suggested by this Court in *Peretz*) that subsection (b)(3) delegations are subject to a *de novo* determination by the district court.

III. The Third Circuit's Decision Conflicts with Relevant Decisions of This Court.

This Court should grant this Writ of Certiorari because the opinion being appealed from "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court R. 10(c). Although this Court has not directly addressed the application of § 636(b)(3) to nonconsensual referrals to magistrates in civil cases, this Court has established certain underlying principles that apply to this case, and the Third Circuit's opinion violates two such fundamental principles. First, this Court has clearly indicated that for a referral to be invalidated there must be a Constitutional limitation under Article III or the Due Process clause. The Third Circuit did not articulate either such limitation. Second, this Court has found referrals to magistrates to be improper only as to actions for which a *de novo* determination is virtually impossible. Contrary to the Third Circuit's opinion, a *de novo* determination in this case was not only possible, but, in fact, actually occurred. In sum, this Court's precedent, which will be discussed below, strongly suggests that a magistrate can conduct a hearing and submit proposed findings in a nonjury civil case, subject to a *de novo* determination by the district court.

A. The Third Circuit's Opinion Conflicts with Rationale Underlying This Court's Application of § 636(b)(3) to Criminal Cases.

By requiring the District Court to establish a specific source of authority for the referral under the Magistrates Act, the Third Circuit misplaced the burden. Congress mandated through the enactment of subsection (b)(3) that the party *objecting* to the referral demonstrate a specific constitutional or statutory prohibition. There is no Article III or due process violation based on the referral in this case.

1. There Is No Article III Violation.

The fundamental interest in Article III is to preserve the balance of powers constitutionally granted to the judicial branch from congressional encroachment. *Northern Pipeline Constr. Co v. Marathon Pipeline Co.*, 458 U.S. 50, 57 (1982). In *Raddatz*, this Court concluded that the nonconsensual referral of a suppression hearing for fact-finding and preliminary conclusions of law by a magistrate did not violate the constitution so long as an Article III judge made the final decision. 447 U.S. at 682–83 (citing *Crowell v. Benson*, 285 U.S. 22 (1932) and *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936)). The dissent in *Raddatz*, authored by Justice Marshall, emphasized the unique and important liberty interests at stake in criminal felony trials. *Id.* at 712.

In *Peretz*, 501 U.S. at 932–33, and *Gomez*, 490 U.S. at 872, this Court held that magistrates could not perform jury selection in a felony criminal trial without consent of the parties. The Third Circuit was apparently blinded by these holdings and failed to give adequate consideration to the Article III analysis in *Peretz*, where this Court stated that no Article III concerns are raised by referrals under the

Magistrates Act because the "ultimate decisions" to appoint and remove magistrates, to refer matters to the magistrate, and to make final rulings, remain with the district court. Because the entire process is under the district court's total control and jurisdiction, there is "no danger" of Congress emasculating the Article III courts. *Peretz*, 501 U.S. at 937. This Court further explained that the district court's *de novo* review, in addition to satisfying due process, also cures any potential Article III concerns. *Id.* at 937–38 (citing Justice Blackmun's concurrence in *Raddatz*, 447 U.S. at 685–86).

Furthermore, the Third Circuit also failed to recognize that the referral at issue in this case is fundamentally different from those at issue in *Peretz* and *Gomez* for four primary reasons. First, this is a civil, rather than criminal, case. Thus, the numerous constitutional protections afforded to criminal defendants by the Constitution are simply not applicable.[6] *See Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983) (referral of civil case poses less constitutional problems than the nonconsensual referral of a suppression hearing upheld in *Raddatz*).

Second, the underlying cause of action in this case is a statutory creation of Congress. In its Article III cases, this Court has recognized that Congress may constitutionally provide non-Article III dispute resolution procedures to resolve statutorily-created rights. *See Northern Pipeline*, 458

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[6] Certainly, the constitutional rights implicated by the criminal cases discussed below are more substantial than those of the parties to this case. This is one of the resulting ironies of the Third Circuit's decision—despite greater constitutional implications in criminal cases, the Third Circuit would give a large corporation like Mead a greater standard of entitlement to an Article III judge in a civil case than an individual defendant would have in a criminal case.

U.S. at 67–70 (discussing the "public rights" doctrine). Then-Justice Rehnquist's concurrence in *Northern Pipeline* concludes that only state common law actions must be heard by an Article III judge. *Id.* at 89–91, *accord Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 584 (1985). A CERCLA cause of action—the only remaining count involved in this case—is obviously a statutory cause of action, not a common law action.

Third, because the parties in this case were not entitled to a jury trial, the Seventh Amendment is not implicated. The underlying CERCLA cause of action does not provide for a jury trial. *Hatco Corp. v. W.R. Grace & Co. Conn.*, 59 F.3d 400, 412–14 (3d Cir. 1995). Thus, the entire discussion of jury selection in *Peretz* and *Gomez* is irrelevant.

Fourth, unlike jury selection, the identification of equitable allocation methodologies is easily susceptible to *de novo* review. In this regard, the resolution of each side's proposed equitable allocation factors, culminating in a report and recommendation, certainly bears far greater similarity to specifically enumerated duties in the Magistrates Act (e.g., motions for injunctive relief, *Daubert* hearings, suppression hearings) than felony voir dire (which *Gomez* acknowledged was not readily susceptible to *de novo* review). In sum, there is simply no Article III violation when a civil nonjury hearing is conducted by a magistrate if the district court makes a *de novo* determination of the magistrate's proposed findings.

2. There Is No Due Process Violation.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court articulated a three-part test for evaluating procedural due process claims. The Court must consider: (1) the private interest that would be affected; (2) the risk of erroneous deprivation and the probable value of additional safeguards;

and (3) the government interest, including fiscal and administrative burdens.[7] In *Mathews v. Weber*, 423 U.S. at 270–72, this Court held that under the 1968 version of § 636(b), a magistrate could manage an entire Social Security matter under *de novo* review of the district court without consent of the parties.

In *Raddatz*, this Court held that it was not a due process violation for a magistrate to preside over a suppression hearing because the district court alone acted as the ultimate decision maker. 447 U.S. at 680–81. The majority rejected the argument that "the one who decides must hear," *id.* at 677, reasoning that the interests in a suppression hearing are of lesser magnitude than those in a felony jury trial. *Id.* at 679. The district court's ability to perform a *de novo* review, including the ability to reject or modify the magistrate's proposed findings and to re-hear witnesses, fully satisfied due process. Justice Blackmun's concurrence in *Raddatz* focused on the "practical concern for accurate results." He reasoned that the Magistrates Act was constitutional because the referral process, followed by objections and *de novo* review by the district court, actually enhances the accuracy of the results. *Id.* at 684–86.

In *Mathews v. Weber*, this Court discussed the numerous due process benefits of referral to a magistrate: (1) it helps focus the court's attention on relevant parts of a voluminous record; (2) it directs the court to legal arguments that are supported by the record; and (3) it gives a "preliminary evaluation of the cumulative effect of the evidence in the record, to which the parties may address argument, and in

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[7] In *Medina v. California*, 505 U.S. 437, 443–45 (1992) this Court held that the *Mathews v. Eldridge* test applied to civil, but not criminal, procedures.

this way narrows the dispute." 423 U.S. at 554–55. All of these factors were directly implicated by the referral at issue here. CERCLA cases are often complex. The Magistrate reviewed and ruled on the admissibility of voluminous exhibits (1,193 in this case), resolved thousands of objections to deposition designations and counter-designations, enabled the parties to fully present their conflicting allocation methodologies, explored difficult technical and scientific issues that required numerous conflicting experts (thirteen in this case), analyzed the experts' methodologies,[8] and gave his evaluation of the cumulative effect of the record. Certainly, many of the tasks performed by the Magistrate narrowed and crystallized the issues in dispute and enabled the District Court to better exercise the discretion given under CERCLA to equitably allocate response costs. The parties were given a full opportunity to make objections to each of the Magistrate's proposed findings. Indeed, the parties received far greater process than if the District Court had simply conducted a hearing itself.

B. The Third Circuit Improperly Limited the Magistrate's Authority Even Though a *De Novo* Determination of the Magistrate's Proposed Findings Was Made by the District Court.

The District Court's referral to the Magistrate was not as broad as the Third Circuit's Opinion implies. In its July 8,

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[8] As noted earlier, in many ways, the proceeding conducted by the Magistrate in this case was analogous to a lengthy *Daubert* hearing, which is well within a magistrate's authority. Because virtually all of the witnesses who testified before the Magistrate were expert witnesses, the Magistrate, similar to what would occur in a *Daubert* hearing, offered to the District Court a synopsis of each expert's qualifications, along with a summary of the analysis performed by each expert.

1996 Order, the District Court directed the Magistrate to perform the following functions: "(1) proposing the equitable factors to be considered under § 9613(f) [of CERCLA], (2) submitting briefs in support of an allocation of Beazer's clean-up costs among the parties and, after a hearing if necessary, (3) a submission of report [to the District Court] addressing the same." App. 246a. In making such a limited referral, the District Court sought only to narrow the issues before it to those equitable factors applicable to the instant case, the goal of judicial economy being acknowledged as within the purview of the Magistrates Act. *See, e.g., Mathews v. Weber*, 423 U.S. at 274 ("[R]eference promotes more focused, and so more careful, decision-making by the district judge."). The Third Circuit, however, undermined this goal by recharacterizing the activities of the Magistrate to those of core trial matters, even though these activities were actually subsidiary to the District Court's *de novo* determinations based on its independent review of the record.

The Third Circuit's Opinion also ignores that, as part of its referral to the Magistrate, the District Court reserved the right to rehear "portions of the evidence and/or hold additional hearings on the same subject matter" as needed. App. 237a. The District Court ultimately determined that this was not necessary because during the proceeding before the Magistrate virtually all of the live testimony presented was that of expert witnesses. Fact testimony from former plant personnel was submitted almost entirely in the form of deposition designations. Moreover, with respect to the expert testimony, the Magistrate's report and recommendation "assign[ed] relative weight on such factors as the methodology employed, the thoroughness of the expert's analysis, the number of potential relevant factors considered, the internal consistency of the testimony and assessments made.... It [did] not discredit any testimony on the basis of

the demeanor or character of the witness." App. 124a n.5. Because Mead filed extensive objections to the report and recommendation of the Magistrate, all of Mead's arguments were fully presented to and decided by the District Court.[9]

Finally, even if this Court agrees with the Third Circuit's determination that the Magistrate went too far in making certain factual determinations as to relative fault, or in entertaining live testimony, this Court should still hear this case in order to clarify the application of the harmless error doctrine to Magistrates Act referrals.[10] In determining whether an error is harmless, one "must be well-satisfied that the error did not prejudice a party, but [one] need not disprove every reasonable possibility of prejudice." *Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 329 (3d Cir. 2001). As stated above, because the District

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[9] Throughout its Opinion, the Third Circuit implied, without any record support, that the District Court did not conduct the in-depth *de novo* review that the District Court stated it conducted. *See, e.g.*, App. 32a n.17 ("Because we conclude that the District Court could not save the flawed referral ... we need not consider **whether it actually performed a *de novo* review** of the Magistrate Judge's report and recommendation.") (emphasis added); App. 33a ("In this case the District Court **claims** that it reviewed both the Magistrate Judge's factual findings and its legal conclusions *de novo*.") (emphasis added).

[10] At least three circuits have relied upon the harmless error doctrine to rehabilitate arguably unauthorized assignments by magistrates by recharacterizing the nature of the referral. *Members v. Paige*, 140 F.3d 699, 701 (7th Cir. 1998) (referral for bench trial in prisoner case treated as evidentiary hearing instead of trial); *United States v. Mueller*, 930 F.2d 10, 12 (8th Cir. 1991) (magistrate's order purporting to enforce IRS summons properly treated as a *proposed order*); *United States v. First Nat'l Bank of Atlanta*, 628 F.2d 871, 873 (5th Cir. 1980) (construing magistrate's order as a *proposed disposition* and the district court's order as an adoption of the magistrate's proposal).

Court reviewed the entire record before making its own ruling on the allocation matter (departing from the proposed findings and conclusions recommended by the Magistrate), the referral did not affect the substance of Mead's rights. *See, e.g.*, Fed. R. Civ. P. 61. Because the final determination of equitable allocation was made by the District Court on the basis of those factors it deemed appropriate, after an exhaustive review of the record, it is "highly probable" that the outcome would have been the same had the Magistrate not been involved at all. *See, e.g., Mathews v. Weber*, 423 U.S. at 274 ("We categorically reject the suggestion that judges will accept, uncritically, recommendations of magistrates.").

The Third Circuit's Opinion also runs counter to strong policies behind the harmless error doctrine aimed at preserving judicial resources and public respect for proceedings. *See, e.g.*, *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (noting that the harmless error test "furthers the 'strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation'") (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)); *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) ("[T]he harmless-error doctrine ... promotes public respect for the ... process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."). The Third Circuit's almost flippant observation that "Beazer's contribution action is now in its fourteenth year and will likely enjoy several more birthdays" (App. 34a), emphasizes the Third Circuit's failure to consider the sound policies behind the harmless error doctrine.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 19, 2005

Supreme Court, U.S.
FILED
OCT 19 2005
OFFICE OF THE CLERK

No. 05-524

In the Supreme Court of the United States

BEAZER EAST, INC.,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos: 02-3727/02-4185

[Filed July 21, 2005]

BEAZER EAST, INC	)
	)
v.	)
	)
THE MEAD CORPORATION	)
	)
v.	)
	)
KOPPERS INDUSTRIES, INC.,	)
The Mead Corporation,	)
Appellant-Case No. 02-3727.	)
	)
	)
BEAZER EAST, INC.	)
	)
v.	)
	)
THE MEAD CORPORATION	)
	)
v.	)
	)
KOPPERS INDUSTRIES, INC.,	)
The Mead Corporation,	)
Appellant-Case No. 02-4185.	)
	)

The petition for rehearing en banc filed by the Appellant in the above-entitled case having been submitted to the judges

who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Jane R. Roth
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos: 02-3727/02-4185

[Filed June 23, 2005]

BEAZER EAST, INC)
)
v.)
)
THE MEAD CORPORATION)
)
v.)
)
KOPPERS INDUSTRIES, INC.,)
The Mead Corporation,)
Appellant-Case No. 02-3727.)
)
)
BEAZER EAST, INC.)
)
v.)
)
THE MEAD CORPORATION)
)
v.)
)
KOPPERS INDUSTRIES, INC.,)
The Mead Corporation,)
Appellant-Case No. 02-4185.)
)

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Western District of Pennsylvania and was argued on December 16, 2003.

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated March 6, 1991, we will reverse the judgments of the District Court and remand this action for further proceedings consistent with this opinion. Costs taxed against appellees.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/_____
Marcia M. Waldron

Dated: June 23, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos: 02-3727/02-4185

[Filed June 23, 2005]

BEAZER EAST, INC

v.

THE MEAD CORPORATION

v.

KOPPERS INDUSTRIES, INC.,
The Mead Corporation,
Appellant-Case No. 02-3727.

BEAZER EAST, INC.

v.

THE MEAD CORPORATION

v.

KOPPERS INDUSTRIES, INC.,
The Mead Corporation,
Appellant-Case No. 02-4185.

OPINION

ROTH, Circuit Judge

The Mead Corporation appeals several orders of the United States District Court for the Western District of Pennsylvania in a CERCLA[1] contribution action brought by Beazer East, Inc. The main issue presented in these appeals is whether the District Court, over Mead's objection, properly referred part of Beazer's action - the equitable allocation proceeding - to the Magistrate Judge. In conducting this proceeding, the Magistrate Judge resolved factual disputes going to one of the ultimate issues in the case - what share of Beazer's response costs should be borne by each of the responsible parties - and, in doing so, essentially tried part of the case. Magistrate judges may not, however, try cases without the parties' consent. Because we conclude that the District Court's referral was an improper delegation of its traditional adjudicatory function, this case must be remanded for a new equitable allocation proceeding before the District Judge.

II. Factual Background and Procedural History

This is the second time this CERCLA contribution action has been before us. *See Beazer East, Inc. v. The Mead Corp.*, 34 F.3d 206 (3d Cir. 1994) (*"Beazer I"*). In 1991, Beazer East, Inc., signed an Administrative Order on Consent (AOC) developed by the United States Environmental Protection Agency. The AOC required Beazer to investigate and cleanup the Woodward Facility Coke Plant, an industrial site in

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[1] Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9675.

Alabama formerly owned and operated by Beazer. Beazer's predecessor, Koppers Company, Inc (KCI), bought the site from The Mead Corporation in 1974. Beazer sought contribution for its investigation and cleanup costs from Mead under CERCLA, 42 U.S.C. §§ 9607(a) & 9613(f). Mead filed a counterclaim for indemnity based on certain provisions of the 1974 purchase agreement. The District Court granted summary judgment to Mead on this basis, but we reversed in *Beazer I*. We held that the key environmental indemnification provision failed the basic rule of Alabama contract law that promises to indemnify must be plain and unambiguous. *Beazer I* at 216-19. Accordingly, we remanded the case to the District Court for further proceedings on Beazer's contribution claim. *Id.* at 219 & n.10.

The chief tasks on remand were to determine which of Beazer's response costs were necessary and consistent with the National Contingency Plan (NCP), 42 U.S.C. 9607(a)(4)(B), and what percentage of those costs should be born by each of the responsible parties: Beazer, Mead, and Koppers Industries, Inc. (KII).[2] 42 U.S.C. § 9613(f)(1) ("In

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[2] On remand Mead filed a third-party complaint against KII, the current owner of much of the site. KII was formed in a 1988 leveraged buy-out led by former KCI managers following Beazer's acquisition of KCI. Beazer sold the operational portion of the site to KII in 1988, agreeing to indemnify KII for environmental liabilities arising from pre-1988 activities. KII continued to operate the site until 1998 and demolished all site structures in 1999.

There is no dispute that Beazer, Mead, and KII are each responsible parties as defined by CERCLA, 42 U.S.C. § 9607(a). Each entity has owned and operated the Woodward Facility, and hazardous substances were disposed of at the facility during each ownership period. *See id.* at § 9607(a)(2).

resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). In July 1996, the District Court referred this second question to the Magistrate Judge, ordering the Magistrate Judge to issue a report, "after a hearing if necessary," identifying the appropriate equitable factors and setting forth an allocation of Beazer's clean-up costs among the parties.

Mead objected, arguing that the Magistrate Judge did not have authority under the Magistrates Act to decide the equitable allocation issue in the first instance without the parties' consent. The District Court rejected this argument, reasoning that equitable allocation was "essentially . . . a pretrial matter" which can be referred to a magistrate judge without the parties' consent per 28 U.S.C. § 636(b)(1), and that any concerns over the Magistrate Judge's authority were allayed by the District Court's retention of *de novo* review over the Magistrate Judge's Report and Recommendation.

The Magistrate Judge conducted a lengthy hearing on the equitable allocation issue in May 1997 and ultimately issued a Report and Recommendation in November 1999. Starting from the premise that responsible parties should pay according to their relative fault, the Magistrate Judge found that Mead was responsible for disposing of approximately 90% of the waste on the site, while Beazer and KII together were responsible for disposing of approximately 10% of the waste. However, the Magistrate Judge adjusted this initial allocation to account for his proposed finding that the parties to the 1974 purchase agreement "intended that Mead be able to 'walk away' from the site, i.e., that Mead would not indemnify [KCI] for any future costs at the site for any

reason, including environmental response costs."[3] The Magistrate Judge proposed that Mead's share of Beazer's response costs be reduced and Beazer's share increased by 15% of the total costs. The Magistrate Judge also found that KII should bear a minor share of the response costs because, as the current owner, it would benefit from the environmental remediation of the site. The Magistrate Judge proposed that KII's share of Beazer's response costs should be 2.5%, that Mead's share should be 73.75% (90% of the waste minus 15% shifted to Beazer minus 1.25%, half of KII's share), and that Beazer's share should be 23.75% (10% of the waste plus 15% shifted from Mead minus 1.25%).

Following Mead's objections, in March 2000, the District Court adopted the Magistrate Judge's report with the following minor modifications: 1) 20% of the total costs -- rather than 15% -- would be shifted to Beazer based on the text, parole evidence, and legal context of the 1974 purchase agreement; and 2) KII's share would be subtracted entirely from Mead's share and added to Beazer's share because Beazer did not bring a contribution claim against KII. Accordingly, Mead's share was reduced to 67.5% (90% minus 20% minus 2.5%), and Beazer's increased to 32.5% (10% plus 20% plus 2.5%).

In February 2002, the District Court conducted a three-day trial to determine which of Beazer's actual costs incurred

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[3] This finding was based on the Magistrate Judge's interpretation of the indemnification clause in the 1974 purchase agreement discussed in *Beazer I*, the "as is, where is" clause in the same agreement, and the law of *caveat emptor* in Alabama at the time of the agreement. The Magistrate Judge further found that KCI performed a full inspection of the site prior to purchase, and was "well aware of the environmental condition of the site."